Kelley v. Microsoft Corporation Doc. 93

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DIANNE KELLEY and KENNETH HANSEN, Plaintiffs, v. MICROSOFT CORPORATION, a Washington corporation, Defendant.	No. C 07-475 MJP DECLARATION OF MARK TINDALL IN SUPPORT OF MICROSOFT'S OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Mark Tindall declares as follows:

1. ***Identity of Declarant.*** I am currently working for Microsoft Corporation in Redmond, Washington and have worked for Microsoft for approximately 4 years. As the Product Marketing Manager in 2006, I oversaw retail marketing activities for the Windows Vista Capable program, including consumer education materials. In particular, I managed the creation and distribution of materials to retailers that described the Windows Vista Capable and the Express Upgrade programs. Microsoft engaged in these efforts to ensure that consumers purchased the right computer in order to get the Windows Vista edition and feature set that was right for them. I make this declaration based upon my personal knowledge acquired in this position.

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Dockets.Justia.com

2. ***Retailer and Consumer Education Efforts.*** Microsoft engaged in extensive efforts to educate retailers (and through them, consumers) about the Windows Vista Capable program, including the available editions of Windows Vista and their features, and the Express Upgrade program that allowed for free or reduced-price upgrades from various editions of Windows XP to corresponding editions of Windows Vista. In addition to the materials offered on its Web Site and other general outreach programs, Microsoft specifically targeted retail sales people and consumers who purchased PCs in Brick and Mortar stores in two primary ways: (1) through "point of purchase" materials such as brochures, shelf display cards and signs that Microsoft provided free of charge to retailers and, if the retailers requested, arranged to have placed in their retail stores from time to time,; and (2) through training that Microsoft provided, either live or on-line, to retailers about the Windows Vista Capable and Express Upgrade programs to ensure that salespeople understood and could inform consumers about the Windows Vista Capable and Express Upgrade programs. (In addition, Microsoft made its Web Site available to retailers and consumers, and its materials encouraged consumers to access the Web pages.)

3. ***May 18, 2006, E-mail to Retailers.*** On May 18, 2006, Microsoft sent an e-mail to major retailers that contained details of the Windows Vista Capable program and information on where consumers could go to find more information. A true and correct copy of this e-mail is attached as Exhibit A. This e-mail blast informed retailers that the Windows Vista Home Basic edition would include the "core experiences" of "innovations in organizing and finding information, security, and reliability" but would not provide the Aero user interface (*see* highlighted passages in Exhibit A).

4. ***Point of Purchase Materials.*** Starting in July 2006, Microsoft sent representatives to retail stores, generally twice a month, to deliver, set up or assist in setting up and organizing the materials in retail stores. The materials included:

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- Monitor Blades and Lug-Ons that attached to the side of PC screens on display in retail stores; *see* Exhibit B, attached, for a true and correct copy.
- Windows Vista Capable Brochures and Brochure Holders; *see* Exhibit C for true and correct copies.
- Windows Vista Capable Tent Cards/Fact Cards; *see* Exhibit D for true and correct copies.

5. The majority of retailers Microsoft approached reacted very positively and welcomed the consumer and retail salespeople training materials. In the United States, CompUSA, Wal-Mart, Office Depot, Staples, Sam's Club, J&R Music and Computer World, BJ's Wholesale Club, Fred Meyer, Fry's Electronics, and Nebraska Furniture Mart (a retail chain that sells computers in five states in the Midwest) participated in training and displayed and distributed Microsoft-provided materials. Microsoft distributed over 7.5 million pieces of collateral, as point of purchase sales materials are called, worldwide, to more than 13,000 stores representing over 180 major retailers.

6. ***Training.*** In addition to providing merchandising materials, Microsoft also provided live and on-line training to retailers to ensure that retailers could inform consumers about the Windows Vista Capable and Express Upgrade programs, including the differences among the various Windows Vista editions and the PC hardware needed to provide their features. Microsoft sent representatives to retail stores that set up the point of purchase materials and provide live training to sales representatives. Microsoft used two different vendors to provide these services – Mosaic Sales Solutions and Reach. Mosaic had 250-275 full-time representatives, and Reach had 6 full-time and 4 part-time employees. The Reach representatives alone trained over 2,000 salespeople at Best Buy, Circuit City, CompUSA, and other retailers. The Mosaic representatives visited and provided training at retail stores of CompUSA, Wal-Mart, Office Depot, Staples, Sam's Club, J&R Music and Computer World, BJ's Wholesale Club, Fred Meyer, Fry's Electronics, and Nebraska Furniture Mart.

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7. ***Training Materials.*** Microsoft's training materials explained that Windows Vista Home Basic would not run the Aero user interface but would provide the "core" features of Windows Vista – including "innovations in finding and organizing information, security and reliability." Microsoft gave retailers training materials to ensure they had ready access to information about the Windows Vista Capable and Express Upgrade programs. These materials included the following:

* Quick Reference Pocket Guide; *see* Exhibit E for a true and correct copy.

* Four-page training document; *see* Exhibit F for true and correct copy.

* Lanyard/Pocket Reference Guide; *see* Exhibit G for a true and correct copy.

8. If retail salespeople could not attend the live training sessions provided by Mosaic or Reach representatives, they could access a Microsoft Web site called ExpertZone to take an on-line course. Microsoft began providing on-line training to retail salespeople on April 21, 2006. Microsoft's records show that 12,403 retail salespeople took the on-line training course in the United States in 2006. The on-line training again explained that Windows Vista Home Basic would not run the Aero user interface but would contain the "core" features of Windows Vista described above.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 16, 2007.

Mark Tindall

EXHIBIT A

Windows Vista Capable Email Blast- Text Version

Subject Line: Are you ready for the future?

Header: Windows Vista™ is coming!

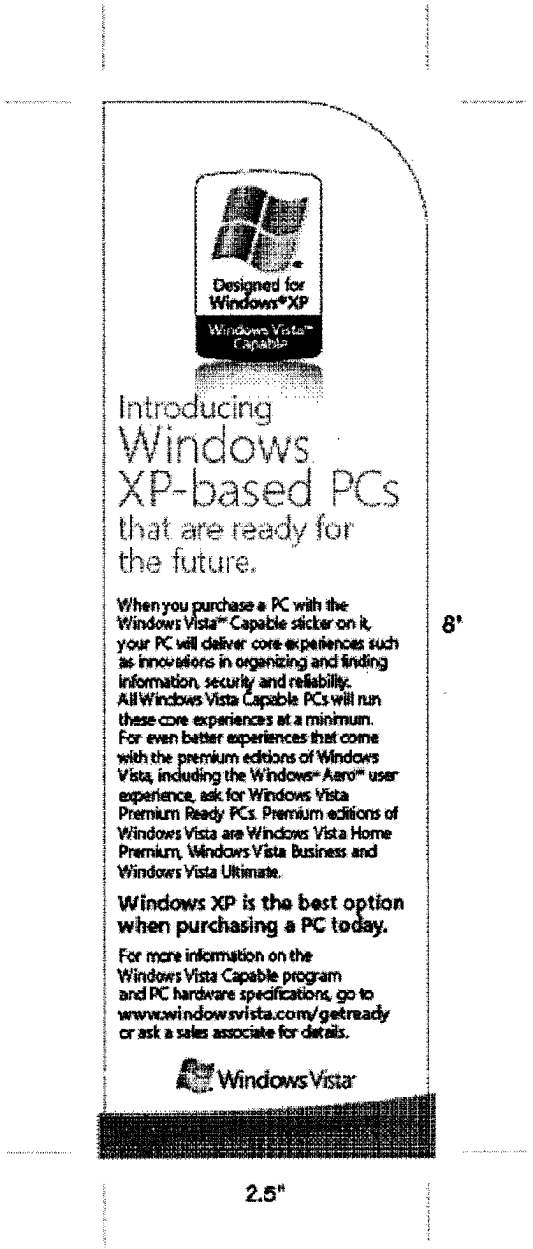
Text:
Get the experience you want out of your PC with Windows Vista™, the next generation of Microsoft® Windows® operating systems. Windows Vista will offer new and rich experiences at home and at work.

When you purchase a PC with the Windows Vista Capable sticker on it, your PC will deliver core experiences such as innovations in organizing and finding information, security, and reliability. All Windows Vista Capable PCs will run these core experiences at a minimum. For even better experiences that come with the premium editions of Windows Vista, including the Windows Aero™ user experience, ask for Windows Vista Premium Ready PCs. Premium editions are Windows Vista Home Premium, Windows Vista Business and Windows Vista Ultimate.

For more information on Windows Vista or the Windows Capable program, click here www.windowsvista.com/getready

Which Windows Vista edition is right for you?	Home Basic	Home Premium	Business	Ultimate
Most secure Windows ever with Windows Defender and Windows Firewall	X	X	X	X
Quickly find anything on your PC and on the Internet with Instant Search	X	X	X	X
Easily organize, edit and share your digital photos with Windows Photo Gallery	X	X	X	X
Elegant Windows Aero user interface* with Flip3D navigation		X	X	X
Best choice for laptops with enhanced Windows Mobility Center and Tablet PC* support		X	X	X
Make face-to-face meetings more productive with Meeting Space		X	X	X
Experience photos and entertainment in your living room with Windows Media Center*		X		X
Share entertainment in your home with Media Center Extenders* including Xbox 360™		X		X
Protect against hardware failure with advanced business Backup features			X	X
Easier connectivity with advanced business Networking and Remote Desktop			X	X
Better protect your data against loss or theft with Windows BitLocker™ Drive Encryption*				X

EXHIBIT B



Microsoft Vista Capable - Monitor Blade
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Prints 4C Process
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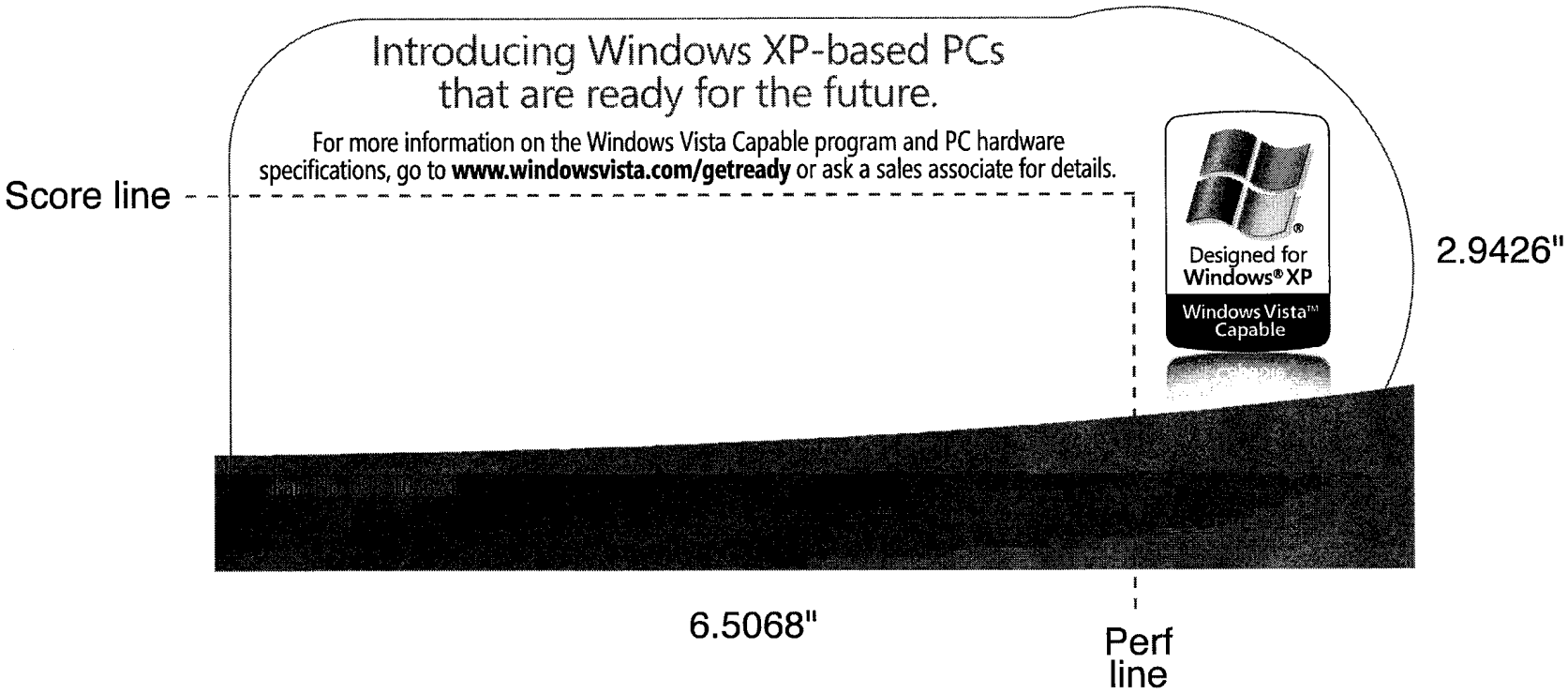
(6MSX-600)

MS-KELL 000000014251



Windows Vista Capable — Lugon
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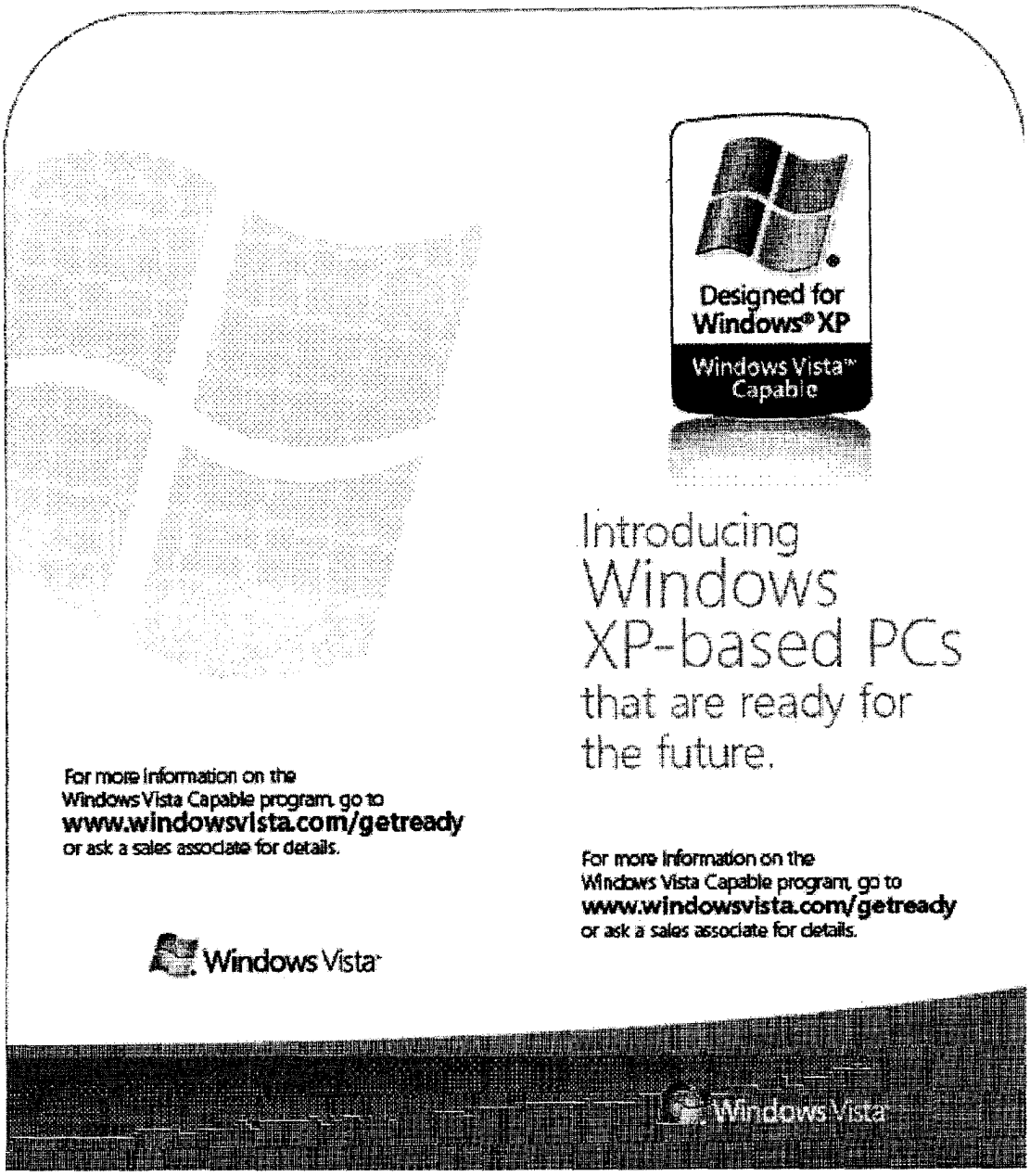
(6MSX-713)

MS-KELL000000014301

EXHIBIT C



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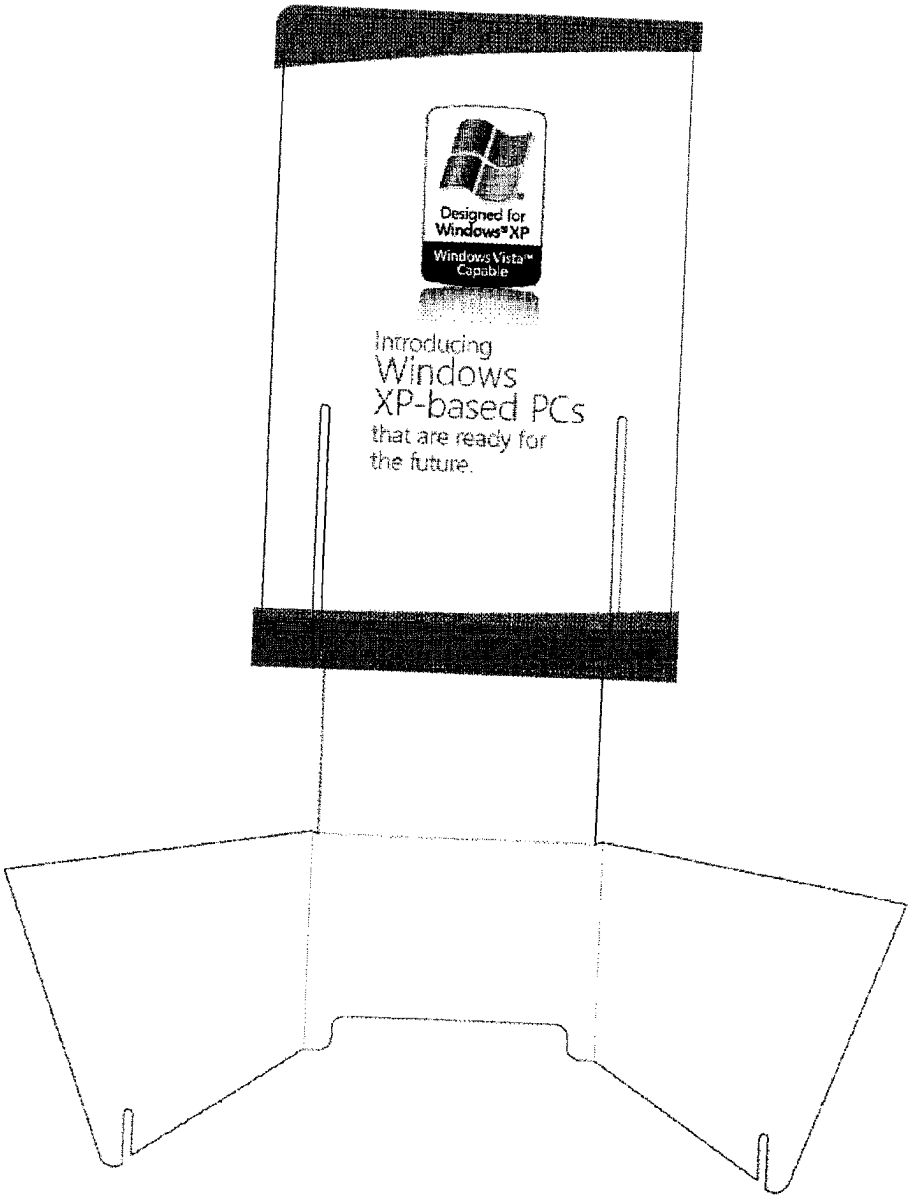
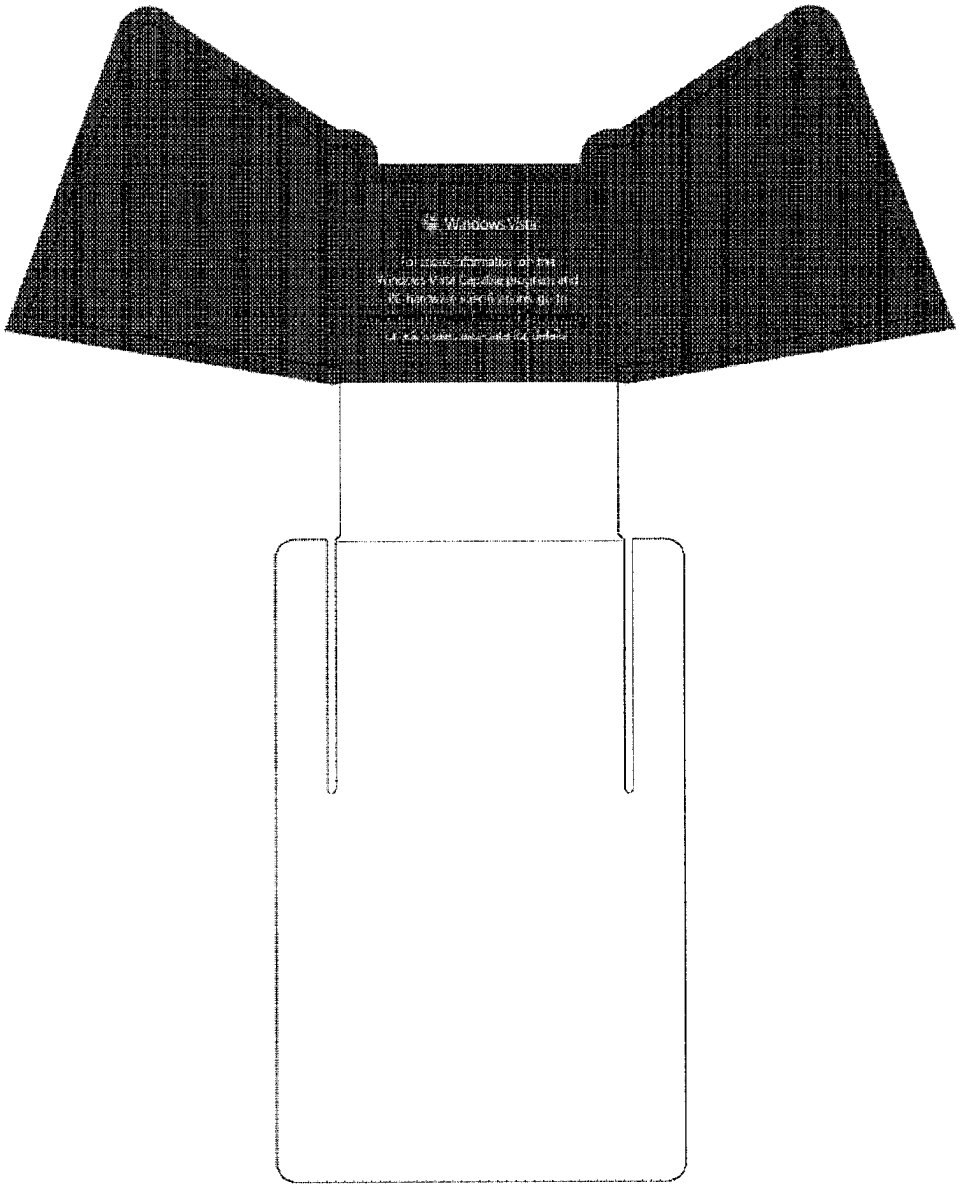


Vista Capable – Brochure Holder (front)
REVISED
13.1685" x 16.6758"
Pocket face size: 4.25" x 3.125"
Red rule indicates diecut – Do Not Print
(6MSX-693)

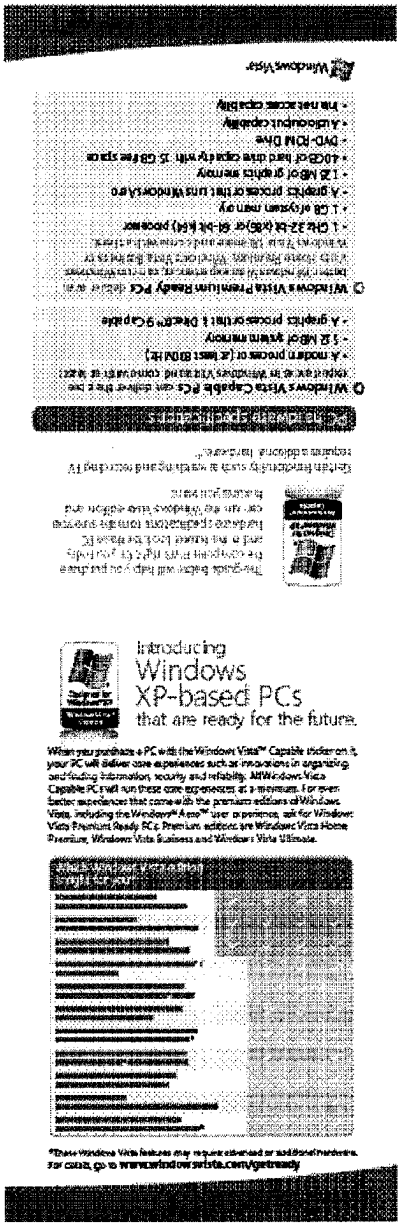
MS-KELL 000000015080



Vista Capable – Brochure Holder (back)
REVISED
13.1685" x 16.6758"
Pocket face size: 4.25" x 3.125"
Red rule indicates diecut – Do Not Print
(6MSX-699)

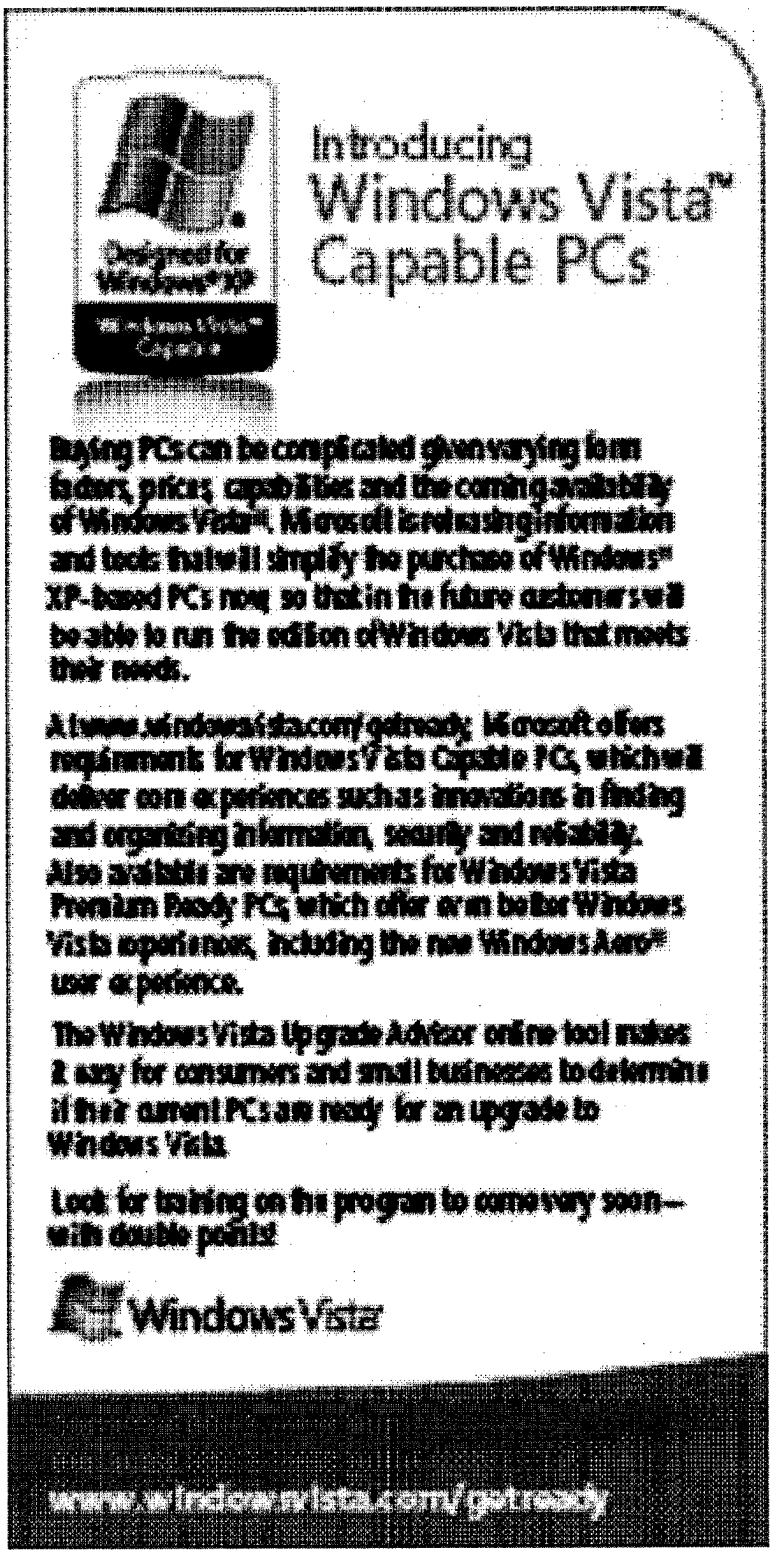
MS-KELL 000000015079

EXHIBIT D



Introducing
Windows
XP-based PCs
that are ready for the future.

EXHIBIT E


Introducing
Windows Vista™
Capable PCs
Buying PCs can be complicated given varying form factors, prices, capabilities and the coming availability of Windows Vista™. Microsoft is releasing information and tools that will simplify the purchase of Windows® XP-based PCs now, so that in the future customers will be able to run the edition of Windows Vista that meets their needs.
At www.windowsvista.com/getready, Microsoft offers requirements for Windows Vista Capable PCs, which will deliver core experiences such as innovations in finding and organizing information, security and reliability. Also available are requirements for Windows Vista Premium Ready PCs, which offer even better Windows Vista experiences, including the new Windows Aero™ user experience.
The Windows Vista Upgrade Advisor online tool makes it easy for consumers and small businesses to determine if their current PCs are ready for an upgrade to Windows Vista.
Look for training on this program to come very soon—with double points!
Windows Vista

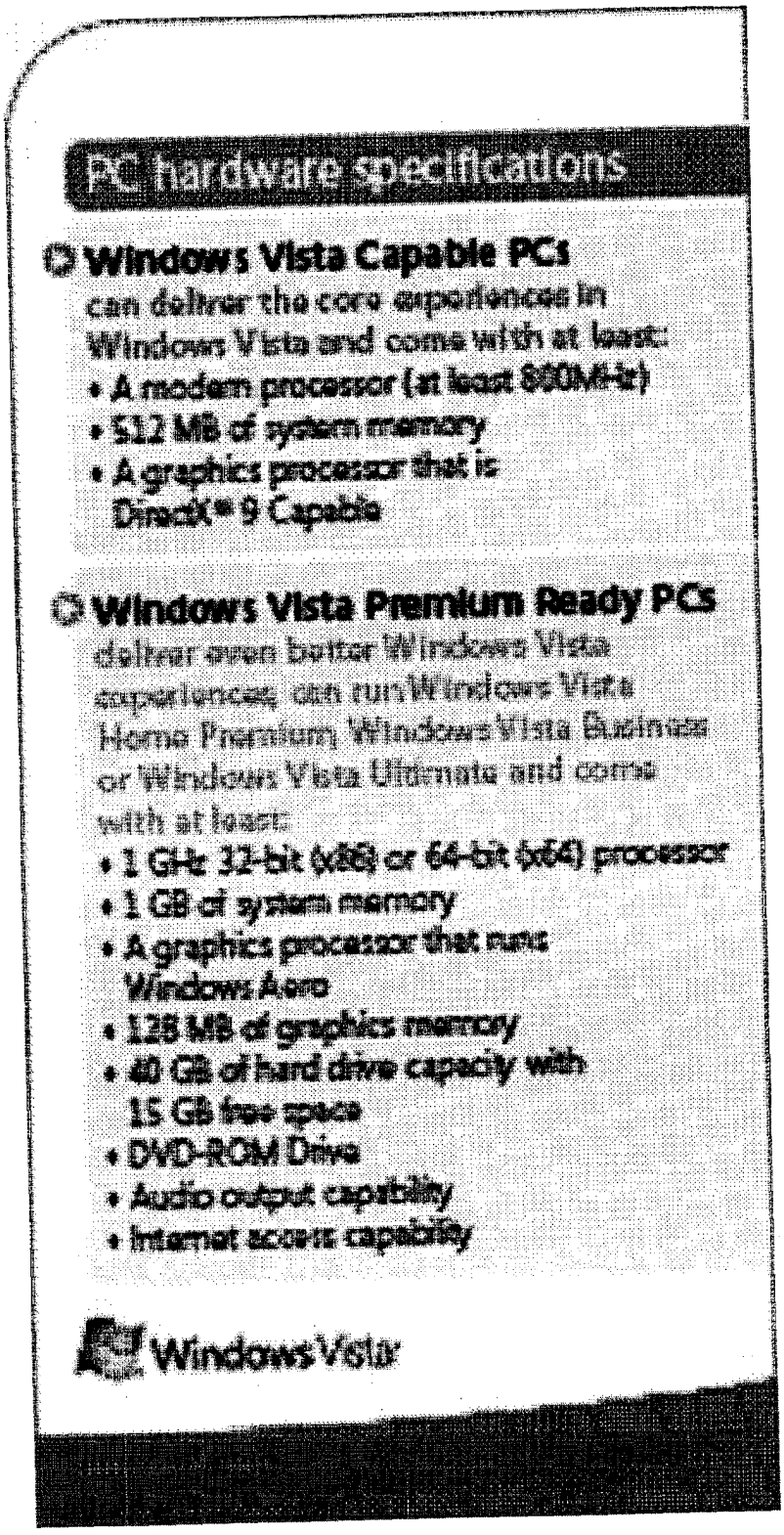

PC hardware specifications
Windows Vista Capable PCs
can deliver the core experiences in Windows Vista and come with at least:
• A modern processor (at least 800MHz)
• 512 MB of system memory
• A graphics processor that is DirectX® 9 Capable
Windows Vista Premium Ready PCs
deliver even better Windows Vista experiences, can run Windows Vista Home Premium, Windows Vista Business or Windows Vista Ultimate and come with at least:
• 1 GHz 32-bit (x86) or 64-bit (x64) processor
• 1 GB of system memory
• A graphics processor that runs Windows Aero
• 128 MB of graphics memory
• 40 GB of hard drive capacity with 15 GB free space
• DVD-ROM Drive
• Audio output capability
• Internet access capability
Windows Vista

EXHIBIT F

Windows Vista™ Microsoft

www.windowsvista.com/getready

Introducing Windows Vista Capable PCs

- Which PCs in your stores today will run the new Windows Vista™ operating system?
- Microsoft wants to make sure you know how to identify those PCs which can be upgraded in order to keep selling the stock in your store with confidence.
- The Windows Vista Capable logo identifies PCs that will deliver core experiences in Windows Vista such as innovations in finding and organizing information, security and reliability.
- Windows Vista Premium Ready PCs are built to run the premium editions of Windows Vista and enhanced features like the new Windows® Aero™ user interface.

June 1st 2006 – January 31st 2007

Windows Vista Capable Program timeline.

- Eligible PCs will carry the Windows Vista Capable logo
- PC manufacturers and retail partners can market and promote eligible PCs as Windows Vista Capable and Windows Vista Premium Ready
- PC manufacturers and retail partners may not promote PCs as Windows Vista Capable or Windows Vista Premium Ready that do not meet program requirements

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Windows Vista

Introducing Windows XP-based PCs that are ready for the future.

Windows Vista Premium Ready PCs can offer even better experiences that come with the premium editions of Windows Vista, including the Windows® Aero™ user experience. Premium editions are Windows Vista Home Premium, Windows Vista Business and Windows Vista Ultimate.

Top 3 Reasons to Sell a Windows Vista Capable PC

1. Buying a PC that is Windows Vista Capable enables you to upgrade to the next version of Microsoft Windows operating system – Windows Vista.
2. A PC that can be upgraded to Windows Vista protects your investment – and broadens your PC horizons by using Windows XP and related technologies.
3. Buying a PC that is Windows Vista Capable helps ensure that you are ready for the future of computing and all that Windows Vista has to offer.

WINDOWS VISTA WILL OFFER NEW AND RICH EXPERIENCES AT HOME AND AT WORK

Windows Vista Home Basic

Windows Vista Home Basic is designed for basic home computing needs. It's made for customers who want to simply use a PC to browse the Internet, correspond with friends and family through e-mail, or perform basic document creation and editing tasks.

Windows Vista Home Premium

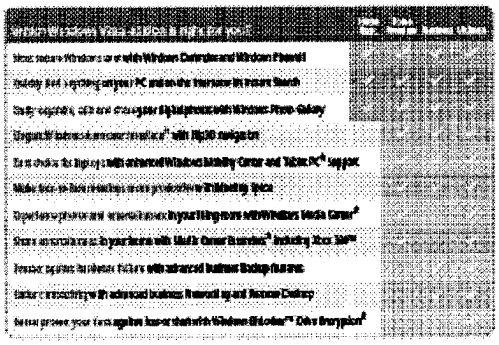
Windows Vista Home Premium will help consumers use mobile or desktop PC functionality more effectively while enabling the enjoyment of new, exciting digital entertainment experiences.

Windows Vista Business

Windows Vista Business is the operating system designed for organizations of all sizes. For small businesses, Windows Vista Business will help keep PCs running smoothly and more securely so they are less reliant on dedicated IT support.

Windows Vista Ultimate

Windows Vista Ultimate is the edition of Windows Vista that has it all. It is the first operating system that brings together all the entertainment features, mobility features and business-oriented features available in Windows Vista.



*These Windows Vista features may require advanced or additional hardware. For details, go to www.windowsvista.com/getready

Remember! Windows XP is the best option for customers purchasing PCs today.

Microsoft

Introducing Windows Vista Capable PCs

Buying PCs can be complicated given varying form factors, prices, capabilities and the coming availability of Windows Vista. Microsoft is releasing information and tools that will simplify the purchase of Windows XP-based PCs now so that in the future customers will be able to run the edition of Windows Vista that meets their needs.

At www.windowsvista.com/getready, Microsoft offers requirements for Windows Vista Capable PCs, which will deliver core experiences such as innovations in finding and organizing information, security and reliability. Also available are requirements for Windows Vista Premium Ready PCs, which offer even better Windows Vista experiences, including the new Windows Aero user experience.

The Windows Vista Upgrade Advisor online tool makes it easy for consumers and small businesses to determine if their current PCs are ready for an upgrade to Windows Vista.

What does the customer want to do with or get from this PC?

- Perform basic tasks like e-mail, Web browsing and document creation
- Good performance
- Improved reliability, security and usability
- Value desktop PC for price-sensitive customers

- Get more from photos, video, TV, movies, music and high-end gaming with the best digital entertainment experience available
- Full graphics functionality that Windows Vista has to offer
- Windows Media Center capabilities
- Advanced look and feel of Windows Aero
- More reliable, more stable, more secure
- Desktop and mobile PC for customers who want the best, fullest Windows Vista experience

What are the PC's hardware specifications?

WINDOWS VISTA CAPABLE PCs REQUIRE:

- A modern processor (at least 800MHz)
- 512 MB of system memory
- A graphics processor that is DirectX® 9 Capable

WINDOWS VISTA PREMIUM READY PCs REQUIRE:

- 1 GHz 32-bit (x86) or 64-bit (x64) processor
- 1 GB of system memory
- A graphics processor that runs Windows Aero
- 128 MB of graphics memory
- 40 GB of hard drive capacity with 15 GB free space
- DVD-ROM Drive
- Audio output capability
- Internet access capability

What Windows Vista editions can customer upgrade to?

WINDOWS VISTA HOME BASIC

To run premium features of Windows Vista, hardware upgrades might be required

THE FOLLOWING WINDOWS VISTA VERSIONS WITH WINDOWS AERO

- Windows Vista Home Premium
- Windows Vista Business
- Windows Vista Ultimate

Windows Vista

CUSTOMERS HAVE QUESTIONS. WE WANT YOU TO ANSWER WITH CONFIDENCE.

We know you are the connection between our products and customers – they look to you for answers and we appreciate all you do to help them. Here are some common questions about Windows Vista Capable and Windows Vista Premium Ready PCs your customers might ask you and some speaking points to help you answer them in return.

1. Customer Question: I see Windows Vista Capable logos on some PCs in your store. What does the Windows Vista Capable logo really mean?

Your Answer: Windows Vista Capable PCs can deliver the core experiences in Windows Vista, such as innovations in organizing and finding information, security and reliability.

2. Customer Question: I am looking for a PC that I can use for the next couple years, and do not want it to be obsolete when Microsoft releases Windows Vista. Since the Windows Vista Capable logo is on this machine, can I assume that upgrading to any version of Windows Vista will not be an issue?

Your Answer: It is important to remember that the Windows Vista Capable logo is for PCs that can run the core experiences in Windows Vista such as innovations in finding and organizing information, security and reliability. If you are interested in doing more with your PC, like watching and recording TV, let me show you a Windows Vista Premium Ready PC that meets your needs.

3. Customer Question: I have heard that Microsoft will be coming out with a new version of Windows that has new multimedia and usability improvements. Should I wait until Windows Vista comes out or should I get a PC now and upgrade it later?

Your Answer: You can buy a PC today with confidence. PCs with the Windows Vista Capable logo will deliver the core experiences in Windows Vista. Since you are interested in multimedia, let me show you a Media Center PC that is Windows Vista Premium Ready.

4. Customer Question: I have been looking at all the PCs on your shelf and see several units that seem to have equal or better system specifications than this PC with the Windows Vista Capable logo. Can I assume that the PC I am looking at will upgrade to Windows Vista even though it does not have the Windows Vista Capable logo?

Your Answer: It may be possible to upgrade the PC when Windows Vista launches. However, if you want the best and easiest upgrade experience, Microsoft recommends buying a PC that has components tested and built specifically for Windows Vista.

5. Customer Question: I am looking for a notebook PC. I am tired of being tied to my big desktop PC. I really like playing games and working with videos and digital photography. Can you recommend a notebook PC that I can upgrade to Windows Vista when it becomes available?

Your Answer: Working with videos and playing games takes quite a bit of system resources. Let me show you some notebooks that are Windows Vista Premium Ready. These Media Center notebooks have high speed processors and plenty of video memory. Your games will play smoothly and your pictures will look great. After upgrading you will be able to use all the new digital entertainment features Windows Vista Home Premium has to offer.

6. Customer Question: I am looking for a new computer but cannot spend too much on one right now. I see some PCs with the Windows Vista Capable logo at great prices. Which one should I purchase and will I be able to upgrade it later to take advantage of all versions of Windows Vista?

Your Answer: All PCs with the Windows Vista Capable logo will be able to deliver the core experiences in Windows Vista, when you upgrade. Let me show you some PCs that are Windows Vista Capable. If you are interested in doing more with your PC, like watching and recording TV, let me show you a Windows Vista Premium Ready PC that meets your needs. Some premium features in Windows Vista may require additional hardware upgrades.

If you have questions or have been asked questions you do not feel comfortable answering, please examine the resources below or escalate questions you have to any Microsoft field Rep as well as your store manager.

WHERE CAN YOU LEARN MORE ABOUT WINDOWS VISTA AND THE CAPABLE PROGRAM?

- Keep a copy of this where all your peers can read it.
- Quick reference pocket guides available.
- Windows Vista Web site: http://www.windowsvista.com/getready
- To determine if your Windows XP PC is ready for an upgrade to Windows Vista, visit the Windows Vista Upgrade Advisor site: www.windowsvista.com/upgradeadvisor
- For a complete list of hardware components that enable PCs to qualify as Windows Vista Capable, you can find the most up to date information at: http://www.microsoft.com/windowsvista/evaluation/hardware/default.mspx

WHEN WILL WE HEAR MORE ABOUT WINDOWS VISTA?

In the coming months Microsoft will be delivering more information regarding Windows Vista. Stay tuned for details regarding:

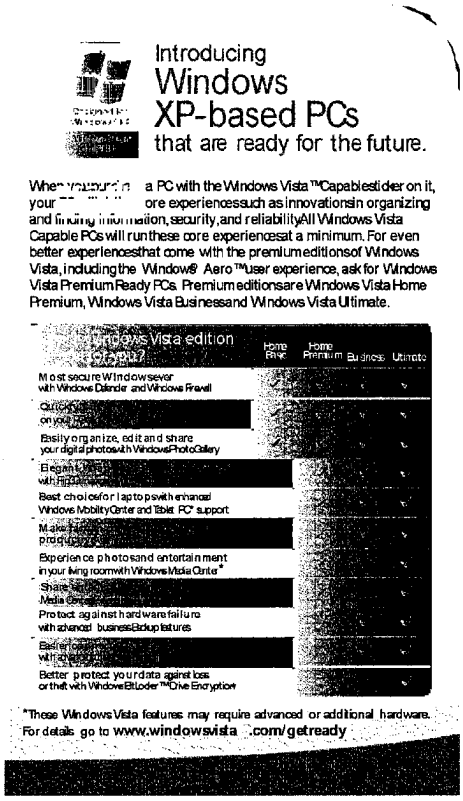
- Detailed product information
- Upgrade paths for current Windows users
- Windows Vista upgrade promotions
- Official launch date

part # 098-106485

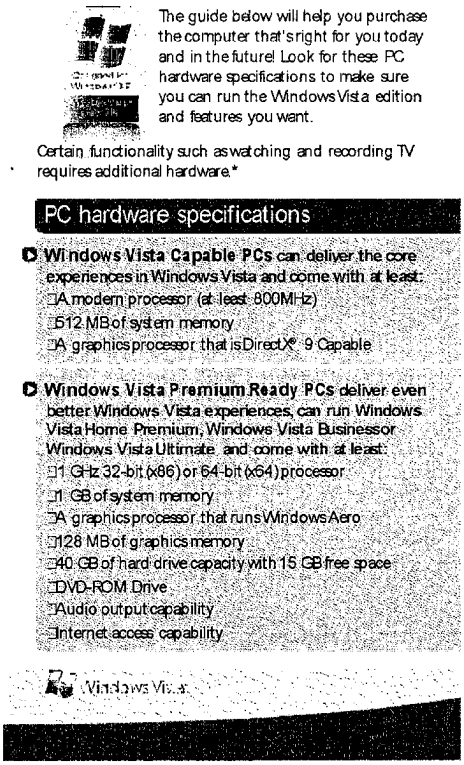
EXHIBIT G

Vista Capable Fact Card-Vista Sku Lineup

3.5" x 6"



FRONT



BACK

MS-KELL 000000029594